In The

Supreme Court of the United States

October Term, 1941.

No.

BERNICE VINCE,

Petitioner,

v.

GREAT NORTHERN LIFE INSURANCE COMPANY,
a Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinion Of Court.

The District Court rendered no opinion in the instant case. The opinion of the Circuit Court of Appeals for the Sixth Circuit has not been officially reported in *Federal (2d) Reports.* But it forms a part of the record filed herein.

II. Jurisdiction.

The decree of the Circuit Court of Appeals was entered on March 11th, 1941. The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 (a) of the Judicial Code as amended (28 U. S. C. A., Section 347). The instant petition shows that the decision of the Circuit Court of Appeals for the Sixth Circuit is not in uniformity with the decisions of the Circuit Court of Appeals for the Second, Third, Fourth and Ninth Circuits regarding the right to a jury trial under the Declaratory Judgment Act of June 14, 1934. This court has not decided this question and in the interest of uniformity has jurisdiction to review the decision complained of by certiorari (see *Baum v. Coty, 262 U. S. 159, 67 L. Ed. 922).*

III. Statement Of the Case.

The essential facts of the instant case have been stated in the foregoing petition, reference to which is prayed.

IV. Specifications Of Error.

The Circuit Court of Appeals for the Sixth Circuit erred in reversing the District Court and directing the entry of a decree adjudging the policy of insurance here involved to be null and void because:

1. Petitioner was entitled to a jury trial under the Declaratory Judgment Act in which the entire case would

be submitted to the jury for its verdict. The Circuit Court of Appeals denied this right.

2. The Circuit Court of Appeals, in denying petitioner the right to a jury trial misquoted the leading case of the *Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446 (C. C. A. 9)* and reached a decision which is in conflict with the applicable decision of this court and the decisions of the other circuits.

3. That in considering this cause the Circuit Court of Appeals apparently reviewed the case as a proceeding in equity in arriving at its conclusion.

4. The Circuit Court of Appeals misstated the position petitioner had maintained in the trial and on the appeal regarding the false statements contained in the application and failed to recognize the other defenses raised by the petitioner.

5. The Circuit Court of Appeals should have affirmed the order of the District Court denying a motion for a directed verdict.

6. The Circuit Court should have affirmed the verdict and judgment entered in the District Court on the basis, to-wit:

(a) That the company did not rely on the false statements contained in the application, or

(b) That the company was put on inquiry by its knowledge of the falsity of the application at the time it was passed upon it and did not have the right to rely upon the application but owed a duty to investigate further, or

(c) That the company did not sustain the burden of proof required by the Michigan statute, Sec. 12427 and 12444 Compiled Laws 1929, providing that unless fraud is shown, statements in the application are deemed representations and not warranties, and that no representation shall bar recovery under the policy of insurance unless made with the intent to deceive or unless it materially affected the acceptance of the risk or the hazard assumed, or

(d) That due to the admission of the company's underwriter that had the illnesses complained of been disclosed in the application, the risk would have been accepted, that the company suffered no prejudice by the false statements complained of, or

(e) That the false statements contained in the application were the conclusions of the company's medical examiner, or

(f) That the company was bound by the knowledge acquired by the medical examiner at the time the application was made and was estopped from raising the defense of false statements in application because of such knowledge.

V. Summary Of Argument.

1. Right of trial by jury.

2. Statutory provisions.

3. Burden of proof rests upon insurance company to show that it was prejudiced by false statements in the application.

4. Statements in application are conclusions of medical examiner and company is bound.

5. The company discovered that the representation complained of was false through knowledge of the 1926-1927 illness and it was its duty to pursue its opportunity to investigate to ascertain the truth or falsity of the representations in the application.

VI. Argument.

1. Right To Trial By Jury.

This court has repeatedly held that where the defense of fraud in the inducement of an insurance policy is available in an action at law, the mere fact that the defendant attaches to such defense a request that the policy be canceled does not give it the right to have the issue taken from a jury and tried by equity procedure. See *Clemmer v. Jefferson, S. L. I. Company, 9 F. Supp. 115; Enelow v. New York Life Insurance Company, 293 U. S. 386; Continental Casualty v. Yerxa, 16 F. (2d) 473; Griesa v. Mutual Life Insurance Company, 169 Fed. 509, Cert. Den. 215 U. S. 600. Pacific Indemnity Company v. McDonald, 107 Fed. (2d) 446,* cited in *2 Federal Rules Service, 38-a, 71* and in *131 A. L. R. 218,* holds that under the Federal Declaratory Judgment Act, and in a case such as the instant cause, there is an absolute right to a jury trial unless a jury has been waived and, further, that the entire case should be submitted to a jury. This decision is adopted by other circuits. See *Lumbermens Mutual Casualty Company v. Timms and Howard, Inc., 108 Fed. (2d) 497 (C. C. A. 2); United States F. & G. v. Koch, 102 Fed. (2d) 288 (C. C. A. 3); United States F.*

& G. Company v. Nauer, U. S. District Ct., d. Massachusetts 1/23/41, 4 Federal Rules Service, 38-a 71, case 1; Aetna Casualty and Surety Company v. Quarles, 92 Fed. (2d) 321 (C. C. A 4). As stated in the petition the position of the Sixth Circuit Court of Appeals is in conflict with all other circuits which have decided this matter.

2. Statutory Provisions.

There are two statutes involved where the issue of false statements in the application is raised, such statutes being as follows:

Michigan Compiled Laws 1929, Sec. 12427:

> "All statements made by the insured, shall, in the absence of fraud, be deemed representations and not warranties."

Michigan Compiled Laws 1929, Sec. 12444:

> "The falsity of any statement in the application for any policy covered by this chapter shall not bar the right to recovery under the policy unless such false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insured."

The Michigan Supreme Court held, in *Schaefer v. Peninsula Insurance Company, 266 Mich. 386,* that the above statute puts upon the insurance company not only the burden of proving the falsity of statement but intent to deceive or other specified material results injurious to

the insurer. In *Gordon v. St. Paul Fire and Marine Insurance Company, 197 Mich. 226,* involving a similar statute, the court held that such legislature was not designed to make forfeitures more available to insurance companies but was designed to curb the right tc declare forfeitures.

3. Burden Of Proof Rests Upon Insurance Company To Show That It Was Prejudiced By False Statements In the Application.

In the case of *Bernadich v. Bernadich, 287 Mich. 137,* involving an insurance policy, the court cited with approval the case of *Francis v. London Guarantee and Accident Company, 100 Vt. 425, 138 Atl. 780,* which held as follows:

> "To sustain a defense of fraud because of misrepresentation or false statements in an insurance contract, it must be shown that the insurer was prejudiced or damaged by such conduct."

The underwriter in the case at hand admitted that if the illnesses complained of had been disclosed in the application, the company would have accepted the risk (R. 177-178).

4. Statements In Application Are Conclusions Of Medical Examiner and Company Is Bound.

Proofs were submitted showing applicant answered orally all questions made by the company's medical examiner who completed the application with his own con-

clusions and that the applicant signed the application without ascertaining the contents thereof (R. 89-95). See *Joyce Law of Insurance, 2d Edition, Section 474-a,* holding that an insurance company is estopped to question the truth of answers in an application where they are made by its own medical examiner who deduces the answers from facts correctly stated to him by the applicant. See also, *Couch, Encyclopedia of Insurance Law, Vol. 2, Section 511, pages 1462-3.*

5. The Company Discovered That the Representation Complained Of Was False Through Knowledge Of the 1926-1927 Illness and It Was Its Duty To Pursue Its Opportunity To Investigate To Ascertain the Truth Or Falsity Of the Representations In the Application.

The underwriter of the company admitted he had knowledge of the 1926 illness at the time he passed upon the application (R. 74). See *61 A. L. R. page 513,* under the subject of "Fraud-Opportunity to Ascertain Facts," Chapter III, entitled "Effect of Warning or Suspicious Circumstances," holding that one may not rely upon representations which would have been shown to be false by an investigation where it discovers that other representations in the same transaction were false. See, also, *Gratz v. Schuler, 25 Cal. App. 117, 142 Pac. 899; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88.*

Petitioner contends the underwriter should have contacted the applicant or checked its own records, which should have disclosed the full medical history according to proofs submitted.

CONCLUSION.

It is respectfully submitted that the decision of the Circuit Court of Appeals is erroneous as a matter of law and, being in conflict with the decisions of this court and the decisions of other circuits, this error should warrant this court in granting certiorari in the instant case.

Respectfully submitted,

ARTHUR J. ABBOTT,
Attorney for Petitioner.

Dated June 7, 1941.